

LETTER OPINION
2000-L-107

June 28, 2000

Ms. Lisa Gibbens
Towner County State's Attorney
PO Box 708
Cando, ND 58324

Dear Ms. Gibbens:

Thank you for your letter asking whether certain information provided to a county in an application for the property tax credit in N.D.C.C. § 57-02-08.1 is confidential under N.D.C.C. § 44-04-18.4.

N.D.C.C. § 57-02-08.1(1) authorizes a property tax credit on the value of a homestead for certain senior citizens and persons who are permanently and totally disabled.

Any person eligible for the exemption herein provided shall sign a statement that the person is sixty-five years of age or older or is permanently and totally disabled, that the person's income, including that of any dependent, as determined in this chapter does not exceed fourteen thousand dollars per annum and that the value of the person's assets, excluding the value of the person's "homestead" as defined in section 47-18-01, does not exceed fifty thousand dollars including the value of any assets divested within the last three years. The term "dependent" includes the spouse, if any, of the person claiming the exemption. . . .

N.D.C.C. § 57-02-08.1(1). "In determining a person's income for eligibility under this section, the amount of medical expenses actually incurred by that person or any dependent person and not compensated for by insurance or otherwise must be deducted." N.D.C.C. § 57-02-08.1(4).

Under the provisions quoted in the previous paragraph, the income, net worth, and medical expenses of the person applying for the credit and any dependents of that person are necessary items of information for a county to determine whether the person is eligible to receive the

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credit. Consistent with these eligibility criteria, the application form prepared by the State Tax Department (State Form 24757) requires <PAGE NAME="p.L-108">applicants to reveal a significant amount of information about their personal finances and the finances of their dependents.

The information in a completed application form is received by the county in the course of operating a government program. Accordingly, the information provided by each applicant is a "record" as defined in N.D.C.C. § 44-04-17.1(15) and may be withheld from the public only if "specifically provided by law." N.D.C.C. § 44-04-18.

"[F]inancial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed." N.D.C.C. § 44-04-18.4(1). As used in this section, the phrase "financial information" is defined broadly to include all information pertaining to finances or monetary resources. 1998 N.D. Op. Att'y Gen. L-17 (Mar. 2 to Carol Olson). This office has previously discussed the application of N.D.C.C. § 44-04-18.4(1) only as it applies to the financial information of a business. E.g., id.; 1998 N.D. Op. Att'y Gen. O-113 (Oct. 16 to Roger Gress and Timothy Davies); 1998 N.D. Op. Att'y Gen. L-77 (June 17 to Douglas Johansen). The application of N.D.C.C. § 44-04-18.4(1) to personal financial information has not been previously addressed.

The plain language of N.D.C.C. § 44-04-18.4(1) is not limited to financial information of a business, and therefore includes personal financial information. In addition, this office looks to judicial interpretations of exemption 4 of the federal freedom of information act (FOIA), 5 U.S.C. § 552(b)(4), when interpreting N.D.C.C. § 44-04-18.4. 1998 N.D. Op. Att'y Gen. at L-18. Exemption 4 has been specifically extended to include personal financial information, based again on the absence of any language limiting the provision to information provided by businesses. *Washington Post Co. v. U.S.*, 690 F.2d 252, 266 (D.C. Cir. 1982).

Based on the plain language of N.D.C.C. § 44-04-18.4(1), as well as federal judicial decisions interpreting a similar federal statute, I conclude that the information about a person's finances or monetary resources which is included in a completed application form for a tax credit under N.D.C.C. § 57-02-08.1 is confidential under N.D.C.C. § 44-04-18.4 if the information is "of a privileged nature" and has not been previously publicly disclosed.

Information has a privileged nature under N.D.C.C. § 44-04-18.4 if disclosure of the information would be likely to 1) impair the public entity's future ability to obtain necessary information or 2) cause

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substantial competitive injury to the person or entity from whom the information was obtained. 1998 N.D. Op. Att'y Gen. at L-20, citing National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. <PAGE NAME="p.L-109">Cir. 1974). Since your question involves personal financial information, and since an applicant for a tax credit under N.D.C.C. § 57-02-08.1 is not in competition with other applicants for the credit, the "competitive injury" prong of the National Parks test does not apply and the question is whether disclosure of the applicant's financial information as contained in the completed application form would impair the county's ability to obtain that information.

Whether the county's future ability to obtain necessary information would be impaired by disclosure is a question of fact on which this office will generally not issue an opinion. 1998 N.D. Op. Att'y Gen. at L-20. However, whether a public entity's ability to obtain information would be impaired "sometimes may be answered as a matter of law" 1998 N.D. Op. Att'y Gen. at O-116. At first glance, it would appear unlikely that a person would forgo the benefits of the tax credit in N.D.C.C. § 57-02-08.1 simply because the application form will be an open public record. C.f. McDonnell Douglas Corp. v. N.A.S.A., 981 F.Supp. 12 (benefit from involvement with government makes it unlikely that person will be deterred from providing financial information). However, the amount of the credit is fairly modest (a reduction in taxable valuation ranging from \$400 to \$2,000) and is therefore easier to forgo for the sake of preserving personal privacy.

In addition, in this case, the information provided on a completed application form is very personal and very detailed. For example, the application form asks the person to identify not only the person's complete net worth and income, but also the person's medical expenses. These figures are broken down by the source of the income or the type of medical expense, rather than just the total amounts. Further, the applicant is required to submit similar information for all dependents. Given the quantity and private nature of the information required on the application form, one can easily see how a senior citizen or person with a disability might be deterred from completing the form if the person knew that the information would become a matter of public record.

Consequently, it is my opinion that the answers to questions four through ten on the application form for a tax credit under N.D.C.C. § 57-02-08.1 are confidential under N.D.C.C. § 44-04-18.4(1). However, N.D.C.C. § 44-04-18.4 is limited to financial information and does not include a person's identity as an applicant for the credit. Therefore, applicants for the tax credit under N.D.C.C. § 57-02-08.1

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should be aware that the fact they applied for the credit is a matter of public record and indicates that they claim to meet the eligibility <PAGE NAME="p.L-110">criteria of the statute (i.e. income of less than \$14,000 per annum and net value of all assets, excluding homestead, of \$50,000 or less).¹

You also ask whether portions of the completed application form, if confidential under N.D.C.C. § 44-04-18.4, nevertheless may be disclosed to the county auditor (who submits a "recap" and certification of the credits provided in the county to the State Tax Department) and to the members of the county commission (who review any application for tax abatement, to which a copy of the completed tax credit application form is attached). County commissioners may have access to confidential county records "if necessary for the proper discharge of their duties." 1999 N.D. Op. Att'y Gen. L-115, L-116 (Nov. 18 to Howard Swanson) (citation omitted). Therefore, it is my opinion that any confidential information on a completed tax credit application form may be disclosed to the county commissioners as necessary for those officials to carry out their statutory duties. Such a disclosure is not a waiver of the confidentiality of the records. 1999 N.D. Op. Att'y Gen. at L-117. See also N.D.C.C. § 44-04-19.2(1) (executive session is authorized for governing body to discuss closed or confidential records).

The forms prepared by the State Tax Department under N.D.C.C. § 57-02-08.1(3) require the county auditor to compile a report which includes some of the confidential information in a completed tax credit application form. Therefore, it is my further opinion that the completed application forms may be disclosed to the county auditor as needed to carry out the auditor's duty to provide information to the State Tax Department.

Sincerely,

Heidi Heitkamp
Attorney General

jcf/vkk

¹ For the same reason, disclosure of the applicant's answer to question three on net worth, which simply confirms the person's eligibility for the credit, would not be confidential under N.D.C.C. § 44-04-18.4.